February 13, 2018

Hearing Chair Tam Doduc  
Co-Chair Felicia Marcus  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Re: Corrected Consolidated Response of Pacific Coast Federation of Fishermen’s Associations and Institute of Fisheries Resources to Hearing Officers’ February 8, 2018 Questions and Department of Water Resources February 9, 2018 Filing

Dear Hearing Chair Doduc and Co-Chair Marcus,

Petitioners Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources are submitting a corrected version of their Consolidated Response to Hearing Officers’ February 8, 2018 Questions and Department of Water Resources’ February 9, 2018 Filing, that makes no substantive changes but merely corrects minor typographical errors that appeared on the following pages:

Page 1, lines 27 and 28: “If and when” should be “Until”
Page 2, line 16: “delta” should be “Delta”
Page 2, line 23: “necssary” should be “necessary”
Page 3, line 4: “established” should be “establish”
Page 7, line 3: “CONCLUSION” should be “IV. CONCLUSION”

Respectfully submitted,

Stephan C. Volker  
Attorney for the Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources

SCV:taf
The Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources (collectively, “PCFFA”) submit this consolidated response to the Hearing Officers’ February 8, 2018 Questions (“Board Questions”) and the Department of Water Resources’ (“DWR’s”) Consolidated Opposition to the Renewed Motion to Stay Part II of the Hearing filed by the Natural Resources Defense Council and others (“Opposition”).

The Board Questions are too little, too late. As PCFFA pointed out in its January 17, 2018 Joinder in the Motions of Save California Delta Alliance, et al. and County of Sacramento, et al. to Stay or Continue WaterFix Part 2 Hearing (“PCFFA Motion to Stay”), this Board’s staff has engaged in improper ex parte communications that disqualify the Hearing Team from further participation in this proceeding, and require dismissal of DWR’s Change Petition. The fact that DWR announced on February 7, 2018 that it was fundamentally altering the Project for which it seeks this Board’s approval simply confirms that this proceeding must be terminated. Until DWR completes the CEQA review required for its new and different Project, and until this Board appoints a different Hearing Team to consider DWR’s new Change Petition for its new
and different Project, the public including PCFFA should not be asked to waste further time engaged in a process that is irretrievably tainted by the Hearing Team’s misconduct, and, in any event, rendered a nullity by DWR’s decision to propose a new and different Project for which CEQA review has not even been started.

This Board’s attempt to gloss over the need to terminate this proceeding by propounding six questions for protestants to answer even before DWR conducts the supplemental CEQA review that it openly concedes is required does not change the fact that this proceeding must be terminated now.

II. THIS BOARD’S SIX QUESTIONS ARE TOO LITTLE, TOO LATE.

On Thursday February 8, 2018, at nearly midnight, the Hearing Officers asked six questions of DWR and other parties, with a deadline of 5 pm on Friday February 9, 2018 for DWR and noon on the following Tuesday February 13, 2018, for other parties. The Hearing Officers set an impossibly short deadline – just over two business days – for protestants to answer fundamental foundational questions regarding the as yet unstudied impacts of DWR’s new and different project to legal users of water, fish and wildlife, public trust resources. The Hearing Officers even asked the parties to comment on the appropriate Delta flow criteria that the Legislature directed this State Water Board to adopt in 2010, nearly 8 years ago.

Incredibly, DWR even purported to promulgate new and improved modeling to accompany its new project on the morning that the hearing was scheduled to begin – February 8 – long after DWR began planning for this approach with its contractors. By imposing such a foreshortened deadline for protestants to address DWR’s fundamental change in its WaterFix Project, the Hearing Officers have prevented the careful consideration and review necessary to provide appropriate answers to the questions raised.¹

¹ The Hearing Officers asked:

1. Does the certified final Environmental Impact Report (EIR) address all potential impacts if the WaterFix Project is constructed and operated in stages? In the supplement to the EIR, what additional analyses will be performed and what specific environmental issues will be evaluated?
2. If DWR constructs and operates the WaterFix Project in stages, to what extent would Reclamation participate during the first stage? Would the WaterFix
DWR admits that a final Supplemental Environmental Impact Report for WaterFix, based on its new, phased approach, will not be available for at least 8 months – October 2018. Yet DWR asks this Board to move forward with a hearing to determine whether the petition will “not injure any other legal user of water” and to establish “the extent, if any, to which fish and wildlife would be affected” and proposals to protect fish and wildlife. Water Code § 1701.2. The public and public interest representatives such as PCFFA are entitled to this Board’s compliance with applicable law, including the prohibition against ex parte communications, the requirement that the Water Board adopt an adequate Bay-Delta Water Quality Control Plan, the requirement that the Board adopt appropriate Delta flow criteria sufficient to protect fish and wildlife and other public trust resources, and the required preparation of an Environmental Impact Report and Environment Impact Statement that fully and fairly address DWR’s new project, its impacts, and alternatives and mitigation measures that would avoid or reduce those impacts to insignificance where feasible to do so.

Unless and until this Board complies with the law and provides for a proper, objective, transparent and fully informed process that complies with all applicable environmental laws, no further proceedings should be held because they needlessly waste precious time and resources. Accordingly, this Board must terminate the hearing and provide protestants with Project be operated differently if Reclamation does not participate?
3. If the WaterFix Project is intended to be constructed and operated in stages, is an amendment to the change petition or any additional supporting information under Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or why not?
4. If the WaterFix Project is constructed and operated in stages, are there potential impacts to legal users of water, fish and wildlife, the public interest, or consideration of appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing issues? Which issues?
5. If a supplement to the EIR is entered into the administrative record, what is the most efficient way to address any new information included in the supplement?
6. Would any conditions necessary to adequately protect the rights of legal users, fish and wildlife, or the public interest be different if the WaterFix Project were constructed in stages? Would appropriate Delta flow criteria be different? Why or why not?
sufficient opportunity to study and address DWR’s new plans and new environmental analysis, if and when they are complete. Protestants must then be afforded an opportunity to prepare direct testimony once this analysis is complete.

III. PRELIMINARY RESPONSE TO SIX QUESTIONS, SUBMITTED UNDER PROTEST.

In an abundance of caution, PCFFA submits the following preliminary responses to this Board’s six questions. It does so without prejudice to its continuing objection to the Board’s continuation of this hearing in the face of the Hearing Team’s unethical misconduct, this Board’s failure to comply with applicable statutory duties, and DWR’s abrupt abandonment of its original project and purported substitution of a new and different project. PCFFA responds preliminarily to this Board’s six questions as follows:

QUESTION 1. Does the certified final Environmental Impact Report (EIR) address all potential impacts if the WaterFix Project is constructed and operated in stages? In the supplement to the EIR, what additional analyses will be performed and what specific environmental issues will be evaluated?

PRELIMINARY RESPONSE: No, the EIR fails to address the original WaterFix Project’s impacts, let alone the new and different impacts from DWR’s new and different Project. PCFFA does not know what "additional analyses will be performed" by DWR should it prepare a Supplement to the EIR.

QUESTION 2. If DWR constructs and operates the WaterFix Project in stages, to what extent would Reclamation participate during the first stage? Would the WaterFix Project be operated differently if Reclamation does not participate?

PRELIMINARY RESPONSE: PCFFA does not know “to what extent would Reclamation participate” in DWR’s new and different proposed Project. Nor does PCFFA know what operational differences would occur should Reclamation not participate. These are questions that DWR and Reclamation must answer before the public is asked to speculate on these matters.

QUESTION 3. If the WaterFix Project is intended to be constructed and operated in
stages, is an amendment to the change petition or any additional supporting information under Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or why not?

PRELIMINARY RESPONSE: Of course an amendment to the Change Petition is required for DWR's new and different Project, because DWR has previously claimed – falsely, apparently – that proceeding with a single tunnel rather than the twin tunnels proposed was infeasible because such a new and different Project would pose substantially new and different water quality and water supply costs and benefits. For example, in DWR's July 17, 2017, Finding of Facts and Statement of Overriding Considerations, DWR stated that isolated conveyance alternatives were "infeasible" because they "would cause greater water quality impacts because of reduced freshwater flows from the Sacramento River into the central and south Delta," which "would result in water quality impairments in the central and south Delta due to the fact that there will be less influence from the Sacramento River and more from the San Joaquin River," and this "would likely cause additional effects to aquatic species through contaminant bioaccumulation," DWR California Waterfix CEQA Findings of Fact and Statement of Overriding Considerations ("Findings"), p. 64 (emphasis in original). DWR also found that "isolated conveyance would cause decreases in surface water deliveries to export users," and "reduce instream flows and create suboptimal conditions for migration." Id. DWR found that isolated conveyance would have greater significant and unavoidable impacts as compared to dual conveyance, including harmful impacts on listed species. Id., at 64-67. Likewise, DWR found that alternatives with fewer than three intakes were "infeasible." Findings, p. 70 (emphasis in original). DWR found that under these alternatives, capacity would be insufficient to address reverse flows in the south Delta, would allow "fish losses in the south Delta [to] continue," and would fail to meet the project objectives. Findings, p, 71 (quote), 70-72. Thus, while DWR claims that its new and different project would have fewer impacts than the WaterFix as approved, DWR's previous Findings indicate otherwise. DWR Opposition 4, 14-15.

QUESTION 4. If the WaterFix Project is constructed and operated in stages, are there potential impacts to legal users of water, fish and wildlife, the public interest, or consideration of
appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing issues? Which issues?

PRELIMINARY RESPONSE: Of course there are massive impacts to legal users of water, fish and wildlife, and to the public interest which require that the key hearing issues in both Part 1 and Part 2 be “revisited.” The reason DWR has decided to prepare a Supplemental EIR is because it concedes, openly, that the statutory criteria for preparation of a supplemental CEQA review pursuant to Public Resources Code section 21166 have been triggered. That section directs that supplemental environmental review is required if (a) "[s]ubstantial changes are proposed in the project which will require major revisions of the environmental impact report,” (b) "[s]ubstantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report,” or (c) "[n]ew information, which was not known and could not have been known at the time the environmental impact report was certified as complete, [has] become[] available.” Id.

PCFFA will not know what "issues” must be addressed until DWR provides the supplemental environmental review that CEQA requires for DWR’s new and different project.

QUESTION 5. If a supplement to the EIR is entered into the administrative record, what is the most efficient way to address any new information included in the supplement?

PRELIMINARY RESPONSE: When and if DWR prepares a supplement to the AR, and when and if DWR may ask this Board to reinitiate review of DWR’s new and different project, then and only then would PCFFA be in a position to comment on “the most efficient way to address any new information included in the supplement.”

QUESTION 6. Would any conditions necessary to adequately protect the rights of legal users, fish and wildlife, or the public interest be different if the WaterFix Project were constructed in stages? Would appropriate Delta flow criteria be different? Why or why not?

PRELIMINARY RESPONSE: Of course new and different conditions will be required to address the new and different impacts from DWR’s new and different project. But the public and PCFFA will not be in a position to address those new and different impacts, through imposition of new and different conditions, unless and until DWR provides the public and this
Board with the supplemental environmental review required by CEQA.

IV. CONCLUSION

For the foregoing reasons, this Board must terminate this proceeding forthwith.

Dated: February 13, 2018

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